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Nos. 82-354, 82-355, 82-398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION

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REPLY BRIEF FOR PETITIONERS CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION

I. DESPITE RESPONDENTS' ATTEMPT TO GLOSS OVER THE ISSUE, THE UNPRECEDENTED STANDARD OF REVIEW APPLIED BELOW SHOULD BE INVALIDATED BY THIS COURT

This case presents two basic issues: (1) Did the Court of Appeals validly overturn the National Highway Traffic Safety Administration's (NHTSA) rescission of the passive restraint rule; and (2) if not, should NHTSA's decision be upheld by this Court?

The respondents all agree that this second issue should be addressed; in fact, they uniformly characterize it as being the ultimate issue before the Court. Brief of State Farm Mutual Automobile Insurance Co., *et al.* (State Farm), at 18-19; Brief for National Association of Independent Insurers, *et al.* (NAII), at 40. At the same time, their defense, or rather lack of defense, of the Court of Appeals' decision suggests that they recognize

the indefensible nature of the standard of review applied by that court.[1] Indeed, State Farm brushes aside challenges to the Court of Appeals' analysis as "irrelevant," apparently viewing that analysis itself as irrelevant to this "intensely factual case." State Farm Brief at 13.

However intense the facts of this case may be, they should not overshadow the legal issues. This Court's intervention is warranted in regard to both the result reached *and* the standard of review applied by the court below. That standard, based on *post hoc*, unenacted congressional reaction, should be explicitly invalidated as contrary to law, for it constitutes precisely the sort of judicial action which calls for correction by this Court.[2] The perfunctory manner in which the respondents have defended their own victory below may commendably reduce argument on this issue, but it should not serve to sweep the issue under the rug.

II. RESPONDENTS HAVE PRODUCED NO BASIS FOR SUPPLANTING NHTSA'S JUDGMENT OF PUBLIC REACTION WITH THEIR OWN INTERPRETATION OF THE RECORD

The support in the administrative record for NHTSA's rescission has already been briefed before this Court; it is not undercut by respondents' arguments. At best, those arguments suggest only that differing conclusions can be drawn from some of the data. However, the "possibility of drawing either of two inconsistent inferences from the evidence does not prevent [an agency] from drawing one of them . . . ." *National Labor Relations Board v. Nevada Consolidated Copper Corporation*, 316 U.S. 105,

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[1] While the decision below is mentioned a number of times throughout respondents' briefs, only 6 of their combined 75 pages of argument are devoted to a detailed defense of the lower court's opinion on the merits. *See* NAII Brief at 40-45.

[2] *See e.g., Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 491 (1951): "This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

106 (1942). More often, as is shown below, respondents' arguments turn out to be contradicted by the very documents they are based on, as well as by previous positions taken by members of the insurance industry.

NAII, for example, claims that NHTSA "ignored both the record and common sense" when it determined that seat belt use would not increase significantly with detachable automatic belts. NAII Brief at 18. Pointing to certain surveys of public attitude, NAII argues that the reasons which people currently give for not wearing seat belts, such as "bothersome," "inconvenient," "forgot," and "too much time/hassle," simply do not apply to automatic belts. NAII Brief at 19-20, *citing* the joint appendix below (C.A.J.A.) at 81, 1110. Admittedly, some of these factors, such as "forgot" and "too much time," appear to relate solely to the active buckling necessary for conventional belts and thus may be eliminated by passive belts. This is not true of the other responses. The bother and inconvenience which people reported for belts are applicable both to buckling *and wearing* those devices.[3] These factors would not be eliminated by automatic belts, nor would such other widely reported factors as discomfort and the fear of being trapped. *See* C.A.J.A. at 81, 1110. Even State Farm admits that, if these reasons are sufficiently widespread, then NHTSA's judgment of low probable belt use "may well be true." State Farm Brief at 39.

NHTSA had determined that one reason for low current belt use rates was a "widespread . . . fear in many members of the public that they could be trapped by the

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[3] This is also evident from the explanatory comments reported in the category of "too much time/hassle." *See* C.A.J.A. at 1113. While some of these additional comments, such as "I never take the time to put [belts] together . . .", relate to the necessity of manual buckling, others do not. For example, the reported observation that "you feel like you are going into a war zone or something" (*id.*) could well describe someone's perception of automatic as well as manual belts.

seat belt after a crash." 46 Fed. Reg. 53,419, 53,424 col. 3 (1981), Appendix to Petition for Writ of Certiorari of the Motor Vehicle Manufacturers Association, *et al.* (MVMA App.) 88a, 110a. Passive belts would not alleviate this fear, and a requirement that passive belts be nondetachable (as the respondents advocate) could only "heighten or trigger that concern." *Id.*

Both NAII and State Farm dismiss this fear as being reported by "only 7%" of the respondents in the 1981 National Seat Belt Study. NAII Brief at 22; State Farm Brief at 34. However, this factor was the fourth most frequent response in this survey (out of 13 total responses). *See* C.A.J.A. at 1108-09. An earlier study found a similar concern, that "belts are dangerous," to be the third most common of seven responses. C.A.J.A. at 81. More importantly, when people were asked to evaluate the *importance* of this fear in the 1981 study, 48% viewed it as "very important" and another 31% rated it as "somewhat important." C.A.J.A. at 1109. When raised in this manner by the pollsters, this issue became "*the* most important explanation" of belt nonuse (C.A.J.A. at 1152 (emphasis added)), a "fairly dramatic difference" which the authors of the study noted (*id.*) but which NAII ignores and State Farm buries in a footnote.

In short, NAII's cavalier claim that the reasons for low belt use are "of course . . . the very excuses that are eliminated by an automatic seat belt" is belied by the very surveys which NAII cites. NAII Brief at 20.

State Farm attacks NHTSA's reliance on volunteerism to partly explain the belt use increase in those passive belt-equipped Rabbits and Chevettes purchased to date. It was NHTSA's view that people who "voluntarily invested in automatic restraints . . . are more likely to use those restraints than someone who is compelled to buy them." 46 Fed. Reg. 53,421 col. 3, MVMA App. at 98a. According to State Farm, "[t]he record discredits this assertion . . . ." State Farm Brief at 41. Yet other

insurance companies saw things differently in the past. In 1978, commenting on Volkswagen's use of ignition interlocks with its passive belts, the Prudential Property and Casualty Insurance Company stated:

> "Thirty percent of those drivers currently driving passive belt-equipped Rabbits, who presumably made a conscious decision to have passive belts, have managed to defeat them. *Less willing drivers* of cars with Rabbit-type systems *will defeat the system more often* and/or generate a serious backlash against the passive restraint mandate." C.A.J.A. at 1716 (emphasis added).

The same point was made by the Alliance of American Insurers:

> "We already know that some people remove or fail to use the passive belts voluntarily purchased as an option on the Volkswagen Rabbit. It would be logical to expect the 'defeat rate' to increase when the passive belts become mandatory purchase items." C.A.J.A. at 1721.

It is State Farm, and not NHTSA, which the record discredits on this point.

Both NAII and State Farm rely on several cost-benefit analyses to argue against NHTSA's judgment of future belt use. According to State Farm, "every cost-benefit analysis ever conducted on passive restraints" has concluded that use rates would increase sufficiently to make the benefits of passive restraints outweigh their costs. State Farm Brief at 22, *citing* U.S. Congress, Office of Technology Assessment, *Technology and Handicapped People: Background Paper No. 1* (1982) (OTA Background Paper); *see also* State Farm Brief at 24-25 n.25, 43 n.45; NAII Brief at 35 n.37. Yet as the OTA Background Paper points out, these cost-benefit analyses rest on "basic assumptions" which have been challenged by "articulate critics." OTA Background Paper at 34. In fact, "most of the criticism is focused on estimates of passive seatbelt use" (*id.*), a factor which the lower court

identified as the key issue in this case.[4] There is no ground for displacing NHTSA's judgment on this basic issue with the assumptions of outside economists.

The same cost-benefit analyses which the respondents cite undercut another of their contentions. On the basis of certain public opinion polls, NAII claims that NHTSA "ignored the evidence that a substantial segment of the population would in fact choose automatic protection for themselves if it were given the opportunity." NAII Brief at 33; *see also id.* at 20-22, 35 n.38; State Farm Brief at 40 n.40. Yet as one cost-benefit analysis, the Graham Study, points out, there are numerous reasons why "analysts should *not* place a great deal of confidence" in surveys of this type. C.A.J.A. at 629-30 (emphasis added). Among these are the unstable nature of expressed preferences, the difficulty of interviewees' dealing with low-probability events, and the susceptibility of peoples' responses to "manipulation by various techniques." *Id.* at 630; *see also id.* at 639-40. The Graham Study is cited by State Farm for other purposes (State Farm Brief at 21 n.20, 25 n.25), but its conclusions on this point clearly justify (if further justification were needed) NHTSA's decision not to rely on these survey results.

State Farm and NAII reserve their harshest attack for NHTSA's consideration of general public reaction. In the previous litigation over Standard 208, the court ruled that NHTSA "cannot fulfill its statutory responsibility unless it considers popular reaction." *Pacific Legal Foundation v. Department of Transportation*, 593 F.2d 1338, 1345 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979). The agency did precisely this in the instant rulemaking. Now it stands accused by the respondents of subjecting Standard 208 to "popularity contests" and "implied public

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[4] The Court of Appeals stated that "[t]he rationality of NHTSA's conclusion about the standard as written *depends entirely* on how well its third step—predicting usage rates with detachable belts—holds up." Opinion below, 680 F.2d 206, 231 (D.C. Cir. 1982) (emphasis added), MVMA App. 1a, 51a.

referend[a]." State Farm Brief at 36 n.36; NAII Brief at 33. In fact, respondents' argument with NHTSA is nothing more than disagreement over a matter of judgment, plain and simple.

For example, State Farm attacks NHTSA's view that the ignition interlock fiasco demonstrated the danger of public backlash against unacceptable safety standards. In NHTSA's words, this could create " 'a poisoning of popular sentiment toward efforts to improve occupant restraint systems in the future.' " 46 Fed. Reg. 53,424 col. 2, MVMA App. at 108a, *quoting* former Secretary of Transportation Coleman. According to State Farm, there is no such "lesson" to be learned from this costly episode, because the "so-called 'ground swell' of protests" that arose over the interlocks " 'actually involved much fewer than 1% of the new car market . . . .' " State Farm Brief at 35 n.35 (citation omitted).

NHTSA, however, was not the first to draw the lesson it did from this episode. That lesson had been drawn in 1976 by Secretary Coleman, and it was embraced soon thereafter by several insurance companies as well. The Allstate Insurance Company, an NAII member,[5] declared that the ignition interlock rule "was so bad, the reaction against it almost killed the entire vehicle safety effort." C.A.J.A. at 1920. The threat of a "serious backlash against the passive restraint mandate" due to passive belt interlocks was also noted by the Prudential Company. C.A.J.A. at 1716. That view may now be inconvenient for the respondents, but it is not arbitrary.[6]

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[5] *See* NAII, Appendix to Brief in Opposition to Petitions for Writs of Certiorari at 1a.

[6] Given this expressed popular hostility towards being forced into belts, and given NHTSA's consideration of this factor, State Farm has no basis for characterizing the implications for nondetachable belts as a "*post hoc* justification entitled to no weight." State Farm Brief at 35. State Farm is also wrong in claiming that "as a practical matter, passive restraints simply are not available for those who want to buy them . . . ." *Id.* at 44 n.47. The admitted avail-

Similarly, the Center for Auto Safety attacks as "especially disingenuous" NHTSA's concern "that nondetachable belts would hinder emergency egress." Brief of Amicus Curiae Center for Auto Safety, *et al.* at 14. The disingenuousness belongs entirely to the Center; in 1978 *it* stated that "a system that does not allow belt separation may result in cases of egress problems . . . ." C.A.J.A. at 1709. While it was the Center's view that "anti-defeat features should be given a higher priority over egress features" (*id.* at 1710), NHTSA was clearly entitled to make its own assessment of these competing factors.[7]

NHTSA also based its decision on considerations of equity. A passive restraint mandate

> "would have required the current regular user of manual belts not only to pay himself for a system that affords him no additional safety protection, but in part to subsidize the current nonuser of belts who may or may not be induced by the automatic restraints to commence regular restraint usage." 46 Fed. Reg. 53,424 col. 2, MVMA App. at 109a.

State Farm derides this as a "theoretical objection" which "pales in comparison to" other factors. State Farm Brief at 43. However, it is NHTSA's function, and not the respondents', to "consider many variables, and make 'trade-offs' between various desiderata in deciding upon a particular standard for auto safety." *Automotive Parts and Accessories Association, Inc. v. Boyd*, 407 F.2d 330, 342 (D.C. Cir. 1968). State Farm's claim that "insurance-premium reductions . . . *could* exceed the cost of the new belts" is, as its own choice of words indicates, specu-

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ability of these devices on "a few models" (*id.*; *see also* NAII Brief at 7 n.11) is clearly a starting point for the satisfaction of whatever public demand there is for them.

[7] NHTSA has "authority to balance present injuries against possible risks posed by safety equipment." *Pacific Legal Foundation*, 593 F.2d at 1346.

lative. State Farm Brief at 43 (emphasis added). As the authors of another document cited by respondents admit, the equitable "issue of *who* benefits and *who* loses . . . from implementation of a passive restraint rule . . . has made a (slow) horse race out of what appears to be a socially desirable objective." OTA Background Paper at 34 (emphasis in original). It is both NHTSA's prerogative and its duty to judge that race, and it has done so.

III. CONTRARY TO RESPONDENTS' ASSERTIONS, NHTSA'S DISCRETION IS NOT FROZEN BY THE HISTORY OF THE PASSIVE RESTRAINT MANDATE

Despite the varying and sometimes contrary decisions on Standard 208 which have been made by successive administrations, the respondents persist in transmuting the history of this issue into an administrative straitjacket. NAII characterizes NHTSA's action as a "complete reversal of direction from a course it had followed for over a decade;" State Farm claims the agency has "abandoned a 12-year commitment to auto safety." NAII Brief at 42; State Farm Brief at 37. This approach carries as little respect for new facts and new administrators as it does for history. Even in the absence of changed circumstances, "[a]dministrators, no less than judges, may differ in their views on the same subjects without becoming arbitrary . . . ." *Herbert Harvey, Inc. v. National Labor Relations Board*, 424 F.2d 770, 783 (D.C. Cir. 1969).

> "Commissions themselves change, underlying philosophies differ, and experience often dictates changes. Two diametrically opposite schools of thought in respect to the public welfare may both be rational . . . . All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term. They are not for the judiciary." *Pinellas Broadcasting Company v. Federal Communications Commission*, 230 F.2d 204, 206 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956).

In this case *the facts* have changed as well. A regulation that "was once called the 'air bag standard'" (NAII Brief at 37 (citation omitted)) was about to become, in effect, a passive belt standard. When NHTSA decided that this standard would not work because of public reaction, it was engaging in a legally required analysis of an issue uniquely committed to administrative judgment. As was stated in *Pacific Legal Foundation*, NHTSA

> "cannot fulfill its statutory responsibility unless it considers popular reaction. Without public cooperation there can be no assurance that a safety system can 'meet the need for motor vehicle safety.' And it would be difficult to term 'practicable' a system, like the ignition interlock, that so annoyed motorists that they deactivated it.
>
> "... In the 1976 decision Secretary Coleman characterized his estimate of public resistance as 'a matter of judgment.' In our view Secretary Adams provided a sufficient explanation of why his judgment differed from his predecessor's." 593 F.2d at 1345-46 (citations omitted; footnotes omitted).

A new administrator has now made his own judgment of public reaction, similar to that of Secretary Coleman, differing from that of Secretary Adams. His decision, no less than those of his predecessors, is entitled to judicial validation.

CONCLUSION

In attacking NHTSA's assessment of the evidence, State Farm and NAII have established only that they disagree with the agency. Flawed as their own interpretation of the record is, the respondents are entitled to their opinions. They are *not* entitled to have those opinions displace NHTSA's judgment, a result reached under the Court of Appeals' creation of an unprecedented and unfounded standard of review. For these reasons, the decision of the Court of Appeals should be reversed, and NHTSA's rescission of the passive restraint mandate should be affirmed.

Respectfully submitted,

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